A

FOONG SEONG EQUIPMENT SDN BHD

v.

KERIS PROPERTIES (PK) SDN BHD & ANOTHER APPEAL

B

FEDERAL COURT, PUTRAJAYA
ALAUDDIN MOHD SHERIFF PCA
HASHIM YUSOFF FCJ
MOHD GHAZALI YUSOFF FCJ
C [CIVIL APPEAL NOS: 02( )-39-2009(A) &
02-43-2009(A)]
16 FEBRUARY 2011

D ***CONTRACT:*** *Joint venture - Joint venture agreement - Housing development scheme between landowner (appellant) and licensed housing developer (respondent) - Appellant's entitlement to gross sale proceeds and other income in respect of residential properties - Whether only due upon completion of development project and release of monies from Housing Development Account - Whether respondent's obligation to pay appellant* E *governed by provisions of Housing Development (Control and Licensing) Act 1966 to the exclusion of express provisions of agreement - Whether reg. 7(k) Housing Developers (Housing Development Account) Regulations 1991 applicable - Whether appellant entitled to be paid the landowners' entitlements in accordance with provisions of agreement*

F ***LAND LAW:*** *Housing developers - Joint venture agreement - Housing development scheme between landowner (appellant) and licensed housing developer (respondent) - Appellant's entitlement to gross sale proceeds and other income in respect of residential properties - Whether only due upon completion of development project and release of monies from Housing* G *Development Account - Whether respondent's obligation to pay appellant governed by provisions of Housing Development (Control and Licensing) Act 1966 to the exclusion of express provisions of agreement - Whether reg. 7(k) Housing Developers (Housing Development Account) Regulations 1991 applicable - Whether appellant entitled to be paid the landowners'* H *entitlements in accordance with provisions of agreement*

The two present appeals were heard together. The appellant had filed an originating summons in the High Court praying for, *inter alia*, a declaratory order that pursuant to cl. 2 of a Joint Venture I Agreement ('JVA'), the appellant was entitled to receive from the respondent all gross sale proceeds and any other income derived

from the housing development scheme under the JVA in the proportion of 11.8958% in respect of wholly residential properties. The High Court judge dismissed the appellant's prayer and held that such entitlement would only be due upon the completion of the development project and release of monies from the Housing Development Account ('HDA'). On appeal, the Court of Appeal affirmed the High Court's decision. Hence, the present appeal in which the following three questions were posed: (i) whether the obligation of the licensed housing developer (the respondent) to pay the owner of the land (the appellant) as provided for in the JVA was subject to and governed by the provisions of the Housing Development (Control and Licensing) Act 1966 ('Act'), to the exclusion of the express provisions of the JVA; (ii) whether reg. 7(k) of the Housing Developers (Housing Development Account) Regulations 1991 ('Regulations') would be applicable; and (iii) whether the appellant was entitled to be paid the landowners' entitlements in accordance with cl. 2.3.1 and other relevant provisions of the JVA.

Held (dismissing the appeals with costs)
Per Hashim Yusoff FCJ delivering the judgment of the court:

(1) A perusal of cls. 2.3.1 and 2.3.2 of the JVA, on the facts, revealed the parties had intended that the payment of entitlement in relation to the residential properties would be deferred, and not immediate or progressive. Clause 13 of the JVA showed that the appellant was aware of the requirements of the Act. It would follow that the appellant also accepted that the monies for the said development must flow through the HDA and that its entitlement could only be realised upon the completion of the project and not before that. Clauses 17 and 20 of the JVA showed the covenant by the landowners to be bound by regs. 5(5)(a), 10 and 11 of the Housing Development (Control and Licensing) Regulations 1989, and by virtue of cl. 1.2 of the JVA a minimum of 100 acres of the land (about 1/3 of the overall development) was to be for commercial and/or residential development. This was to enable the landowners to derive some immediate benefit while awaiting the monies from the residential development which they knew would only come upon completion of such development. Based on the statutory provisions referred to above, the Court of Appeal was right in holding that where

the landowner had entered into a JVA with the housing developer to develop the land on a joint venture basis, the Act was applicable. Question (i) was, therefore, answered in the affirmative. (paras 31-37)

(2) As there was no purchase of the land for the housing development in this case, reg. 7(k) of the Regulations was, thus, not applicable, and there was no necessity to answer Question (ii). (para 38)

(3) The landowners had nothing to lose as the developer could not charge the land to finance the project. The monies paid by the purchasers would go into the HDA, but the developer could only withdraw from that account when the project had been completed or when there was surplus money. Otherwise, the developer would have to pay out first to the landowners from its own pocket since it could not make any withdrawal from the HDA until the project was completed. The developer would lose out if the project was not completed eventually, but the landowners would not lose anything as the title of the land still remained with them. Question (iii) was, hence, answered in the negative. (para 39)

Bahasa Malaysia *Translation Of Headnotes*

Kedua-dua rayuan semasa didengar bersama-sama. Perayu telah memfailkan saman pemula dalam Mahkamah Tinggi menuntut, antara lain, suatu perintah pengisytiharan bahawa mengikut kl. 2 suatu Perjanjian Usahasama ('PU'), perayu berhak menerima dari responden semua hasil jualan kasar dan apa-apa pendapatan lain dari skim pemajuan perumahan di bawah PU dalam kadaran 11.8958% berhubungan dengan kediaman hartanah sahaja. Hakim Mahkamah Tinggi menolak tuntutan perayu dan memutuskan bahawa hak sebegitu hanya genap masa selepas penyudahan projek pemajuan dan pelepasan wang dari Akaun Pemajuan Perumahan "APP'). Atas rayuan, Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi. Oleh yang demikian, rayuan semasa di mana tiga soalan yang berikut dikemukakan: (i) sama ada kewajipan pemaju perumahan berlesen (responden) untuk membayar pemilik tanah (perayu) seperti yang disediakan dalam PU tertakluk pada dan dikawal oleh peruntukan-peruntukan Akta Pemajuan Perumahan (Kawalan dan Perlesenan) 1966 ('Akta'), dengan

pengecualian peruntukan-peruntukan nyata PU; (ii) sama ada Peraturan 7(k) Peraturan-Peraturan Pemaju Perumahan (Akaun Pemajuan Perumahan) 1991 ('Peraturan-Peraturan') digunapakai; dan (iii) sama ada perayu berhak dibayar hak-hak pemilik tanah mengikut kl. 2.3.1 dan peruntukan-peruntukan relevan lain PU.

Diputuskan (menolak rayuan-rayuan dengan kos)
Oleh Hashim Yusoff HMP menyampaikan penghakiman mahkamah:

(1) Penelitian kls. 2.3.1 dan 2.3.2 PU, berdasarkan fakta, mendedahkan bahawa pihak-pihak berniat bahawa pembayaran hak berhubungan dengan hartanah kediaman akan tertunda, dan bukan serta-merta atau progresif. Klausa 13 PU menunjukkan bahawa perayu sedar tentang keperluan-keperluan Akta. Ia mengikuti bahawa perayu juga menerima bahawa wang bagi pemajuan tersebut mesti disalurkan melalui APP dan bahawa haknya hanya boleh disempurnakan setelah projek disudahkan dan bukan sebelum itu. Klausa 17 dan 20 PU menunjukkan janji oleh pemilik tanah untuk diikat oleh Peraturan-peraturan 5(5)(a), 10 dan 11 Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Perlesenan) 1989, dan oleh kerana kl. 1.2 PU tanah minima sebanyak 100 hektar (lebih kurang 1/3 pemajuan keseluruhan) adalah untuk pemajuan komersial dan/atau kediaman. Ini adalah untuk membolehkan pemilik tanah mendapat faedah serta-merta sementara menunggu wang dari pemajuan hartanah yang mereka tahu hanya akan diterima selepas penyudahan pemajuan sebegitu. Berdasarkan peruntukan-peruntukan statutori yang dirujuk di atas. Mahkamah Rayuan betul apabila memutuskan bahawa di mana pemilik tanah telah menandatangani suatu PU dengan pemaju perumahan untuk memajukan tanah berasaskan dasar usahasama, Akta boleh digunapakai. Soalan (i), oleh itu, dijawab dalam bentuk afirmatif.

(2) Oleh kerana tidak ada pembelian tanah untuk pemajuan perumahan dalam kes ini, Peraturan 7(k) Peraturan-Peraturan, oleh itu, tidak digunapakai, dan tidak ada keperluan untuk menjawab Soalan (ii).

(3) Pemilik tanah tidak kerugian apa-apa kerana pemaju tidak dapat menggadaikan tanah untuk membiayai projek. Wang yang dibayar oleh pembeli akan dimasukkan dalam APP, tetapi

pemaju hanya boleh mengeluarkan wang dari akaun itu apabila projek telahpun disiapkan atau bila terdapat kelebihan wang. Jika tidak, pemaju sendiri mesti membayar dahulu kepada pemilik tanah kerana ia tidak dapat mengeluarkan wang dari APP sehingga projek disiapkan. Pemaju akan kerugian jikalau projek tidak akhirnya disiapkan, tetapi pemilik tanah tidak akan kerugian apa-apa kerana hakmilik tanah masih kekal kepunyaan mereka. Soalan (iii), oleh yang demikian, dijawab secara negatif.

Case(s) referred to:

City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd [1987] 1 LNS 62 PC ***(refd)***

Datuk Syed Kechik Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors & Another Appeal [1998] 3 CLJ 169 CA ***(refd)***

Mulpha Pacific Sdn Bhd v. Paramount Corporation Bhd [2003] 4 CLJ 294 CA ***(refd)***

Legislation referred to:

Housing Development (Control and Licensing) Regulations 1989, regs. 5(5)(a), 10, 11

Housing Developers (Housing Development Account) Regulations 1991, reg. 7(k)

(Civil Appeal No: 02()-39-2009(A))

For the appellant - Robert Lazar (P Gananathan & Olivia Loh with him); M/s Gananathan Loh

For the respondent - Leong Sai Hwa (Lai Sue Ann & Wong Siang Ping with him); M/s CK Leong & Co

(Civil Appeal No: 02()-43-2009(A))

For the appellant - Meyappan Pillai (Alvin Teo Sze Pin with him); M/s Meyappan Pillai & Assoc

For the respondent - Leong Sai Hwa (Lai Sue Ann & Wong Siang Ping with him); M/s CK Leong & Co

[Appeal from Court of Appeal; Civil Appeal No: A-02-168-2007]

[Editor's note: For the Court of Appeal judgment, please see Foong Seong Equipment Sdn Bhd v. Keris Properties (PK) Sdn Bhd [2011] 4 CLJ 42.]

Reported by Suresh Nathan

JUDGMENT

Hashim Yusoff FCJ:

[1] There were two appeals before us, *viz*:

(i) Federal Court Civil Appeal No. 02-39-2009 (A);

(ii) Federal Court Civil Appeal No. 02-43-2009 (A).

At the outset, both counsel agreed that these two appeals be heard together.

Brief Facts

[2] The facts as elucidated before the Court of Appeal are as follows:

> [4] By consent of the parties herein, U-Meng Corporation Sdn. Bhd. and U-Meng Holdings Sdn. Bhd (collectively "U-Meng") were granted leave to intervene in this appeal.
>
> [5] The defendant does not dispute the appointment of Receivers and Managers ("R & M") for the plaintiff.
>
> [6] The Joint Venture Agreement dated 4 May 1966 ("the JVA") was entered into between the plaintiff, the defendant and U-Meng. The plaintiff is the owner of a piece of land, with an area of 133 acres. U-Meng is the owner of another piece of land with an area of 147 acres. Pursuant to the JVA, these two pieces of land are to be developed by the defendant, a licensed housing developer, on a joint venture basis for, *inter alia*, residential properties. (A reference hereinafter to a clause is a reference to that clause in the JVA).
>
> [7] Cl.2.1 provides, *inter alia*, that the two Landowners would get 25% of the gross sale proceeds from residential properties. More specifically, the plaintiff would get 11.8958% of all gross sale proceeds from residential properties.
>
> [8] Other clauses, relevant to the instant appeal, *viz* clauses 2.3.1 and 13.1, merit reproduction as follows:
>
> > 2.3.1. In respect of development falling within the Housing Developers (Control and Licensing) Act 1966, the Developer shall appoint Keris Properties Sdn Bhd of No. 31 Jalan Ali Pitchay, 30250 Ipoh, Perak as its main contractor and the Developer hereby undertakes to pay

A to the Landowners the Landowners' Entitlement supported by a statement of the sales and receipts within seven (7) days of receipt of payments by Keris Properties Sdn. Bhd for the Housing Development Account in respect of such development; and

B 13. **Housing Development Account**

13.1. Where the type of development within the Development Scheme falls within the Housing Developers (Control and Licensing) Act 1966, the Developer shall comply with such Act and the regulations thereunder in particular C the Housing Development account. The Developer shall be solely responsible for such Housing Development Account which will be operated by the Developer Provided Always the Landowners shall not be liable in any way whatsoever in respect of such Housing D Development Account".

[9] The Housing Developers (Control and Licensing) Act 1966, referred to in clauses 2.3.1 and 13.1 is now known as the Housing Development (Control and Licensing) Act 1966 ("the Act"). The Housing Developers (Housing Development Account) E Regulations 1991 ("the Regulations") were made under the Act to regulate the opening, management and maintaining of the Housing Development Account. (The Act, other regulations made thereunder, and the Regulations are collectively referred to in this judgment as "the housing legislation").

F

[10] The plaintiff has, prior to the appointment of R & M, received advances from the defendant, amounting to RM2,421,681.63 between May and September 2003.

[11] The prayer for residential properties is allegedly based on G clauses 2.1, 2.3.1 and 13.1 and also the sale and purchase agreements entered into between the plaintiff, the defendant and third parties who are the purchasers of residential properties.

[3] The appellant (plaintiff) had filed an originating summons in the Ipoh High Court against the respondent (defendant) praying H for, *inter alia*, a declaratory order that pursuant to cl. 2 of the JVA, the plaintiff is entitled to receive from the defendant all gross sale proceeds and any other income derived from the development scheme under the JVA in the proportion of 11.8958% in respect of wholly residential properties ("the payment for residential I properties").

[4] The learned High Court Judge dismissed the prayer for entitlement for payment from the residential properties and held that such entitlement would only be due upon the completion of the development project and release of monies from the Housing Development Account ("HDA"). A

[5] On appeal, the Court of Appeal affirmed the High Court's refusal to grant a declaratory order in terms of the appellant's (plaintiff) prayer for entitlement for the residential properties. Hence the present appeal to this court. B

[6] In this appeal, three questions were posed, ie,: C

(i) Whether the obligation of the licensed housing developer to make payment to the owner of land as provided for in the Joint Venture Agreement is subject to and governed by the provisions of the Housing Development (Control and Licensing) Act 1966 to the exclusion of the express provisions of the Agreement; D

(ii) Whether reg. 7(k) of the Housing Developers (Housing Development Account) Regulations 1991 will be applicable; E

(iii) Whether the owner of the land is entitled to be paid the Landowners' entitlements in accordance with cl. 2.3.1 and other relevant provisions of the agreement entered into between the parties hereto? F

[7] On question (i), learned counsel for the appellant referred to cl. 2.1 of the JVA dated 4 May 1996 which provides, *inter alia*:

> 2.1 It is hereby agreed by the parties hereto that the gross sale proceeds and any other income derived from the said Development Scheme (irrespective of whether the development is on U-Meng's Land or Foong Seong Equipment's Land) shall be divided between the parties hereto as follows: G
>
> A. In respect of wholly residential development, H
>
> (a) Seventy-Five per cent (75%) to the Developer; and
>
> (b) Twenty-Five per cent (25%) to the Landowners in the following proportions:
>
> (i) Thirteen Point One Zero Four Two per cent (13.1042%); derived from 52.4168 x 25%) to U-Meng; and I

A (ii) Eleven Point Eight Nine Five Eight per cent (11.8958%); derived from 47.5832 x 25%) to Foong Seong Equipment; AND

[8] Further, cl. 2.3.1 provides:

B 2.3.1 in respect of development falling within the Housing Developers (Control and Licensing) Act 1966, the Developer shall appoint Keris Properties Sdn Bhd of No. 31 Jalan Ali Pitchay, 30250 Ipoh, Perak as its main contractor and the Developer hereby undertakes to pay to the Landowners the Landowners' C Entitlement supported by a statement of the sales and receipts within seven (7) days of receipt of payments by Keris Properties Sdn Bhd from the Housing Development Account in respect of such development;

[9] Relying on cl. 2.3.1 learned counsel for the appellant/plaintiff D submitted that the appellant is entitled to immediate payment of its entitlements for Residential Development. It is the appellant's principal argument that the purpose of the Housing Legislation is to regulate the relationship between a developer and a purchaser and the objective of such legislation does not extend beyond that. E Reference was made to the case of *City Investment Sdn. Bhd. v Koperasi Serbaguna Cuepacs Tanggungan Bhd.* [1987] 1 LNS 62 which makes it clear that the policy effect of the HDA is to protect house purchasers and regulate developers, and no more.

F **[10]** It was submitted that the Act only applies to the developer and the purchasers and not the landowner (appellants). Under the HDA, the landowner becomes a party because he remains as the owner of the land, but there is no provision to say that the landowner has to wait until the development is completed before G he could get his due for the residential properties.

[11] Learned counsel therefore submitted that the Act does not apply in this particular case because of cl. 2.3.1 in the JVA. It was his contention that parties should be free to enter into contracts as they like and that Landowners should not be subjected to the H Act, since the Act is meant to protect only the house purchasers.

[12] On the facts of the instant appeal, it was submitted that when the Developer, ie, Keris Properties (PK) Sdn. Bhd. received money from the Contractor (Keris Properties), then within seven I days, the Developer has to pay the same to the landowner (appellant) pursuant to cl. 2.3.1 of the JVA.

Case No. 02-43-2009 (A)

[13] The same issues arose in this appeal. Learned counsel for the appellants (U-Meng Corporation Sdn. Bhd. and U-Meng Holdings Sdn. Bhd.), submitted that these appellants were not parties to the proceedings at the Ipoh High court but were allowed to intervene in the proceedings at the Court of Appeal by consent of all the parties and were named as the 2nd and 3rd appellants therein.

[14] He submitted that the U-Meng companies have since the actual commencement of the developments received their entitlements for the residential property development in the manner provided for in cl. 2.3.1 of the JVA from the developer, Keris Properties (PK) Sdn. Bhd. There has been substantial performance. Of the total sums received by the UMeng companies (RM15,364,231.59), RM13,483,999.95 were for payments of entitlement for residential properties pursuant to cl. 2.1.1 of the JVA. The parties had all along acted in reliance of and in compliance of the payment provision of cl. 2.3.1. It was stressed that this payment clause was fundamental to the very basis the Landowners (both the UMeng companies and the Foong Seong Equipment Sdn. Bhd.) entering into this venture with the developer Keris Properties (PK) Sdn. Bhd., the respondent.

[15] Reference was made to cl. 16.1 of the JVA whereby the developer covenants that by sub-clauses:

> (b) shall not suffer the Landowners to any disadvantage, encumbrance or loss of benefit though the costs, omission, defaults or neglects of the Developer whether wilfully due or otherwise;
>
> (c) shall duly and punctually perform and observe all its obligations under this Agreement.

[16] It was further submitted that the learned High Court Judge made a mistake by saying that payment made to Keris Properties (contractor) was actually payment made to Keris Properties (PK) Sdn. Bhd. (developer). The learned judge held that the defendant (respondent) was therefore estopped from denying that the plaintiff (Foong Seong Equipment Sdn. Bhd.) had in fact been paid its entitlement under the JVA.

Clause 16.1(b) and (c) of the JVA provides:

> 16.1 The Developer hereby covenants that during the continuance of this Agreement, the Developer:
>
> (a) ...
>
> (b) shall not suffer the Landowners to any disadvantage, encumbrance or loss of benefit through the acts, omission, defaults or neglects of the Developer whether wilfully done or otherwise;
>
> (c) shall duly and punctually perform and observe all its obligations under this Agreement;

[17] Learned counsel submitted that what cl. 2.3.1 states is that the payment of the Landowners Entitlements was to be made progressively seven days after the contractor had received its payment from the HDA. Keris Properties was the nominated main contractor by Keris Properties (PK) Sdn. Bhd., the Developer. What had been the fundamental basis for the Landowners entering into the JVA was that the obligations to pay the Landowners residential payments progressively by the Developer was crystallised when the main contractor received its payments from the HDA from the developer. These payment obligations to the Landowners (U-Meng and Foong Seong Equipment) were private contractual obligations due from the respondent ("KP" (PK) Sdn. Bhd.).

[18] It was also submitted that the provisions in the JVA were specific that there is no partnership (see cl. 28.1) and that notwithstanding that U-Meng and Foong Seong Equipment Sdn. Bhd. may have been referred to collectively in the JVA, as the Landowners, the rights obligations and liabilities as between all the parties hereto are several and not jointly.

[19] Reference was made to the case of *Mulpha Pacific Sdn. Bhd. v. Paramount Corporation Bhd.* [2003] 4 CLJ 294 where the Court of Appeal *inter alia* held:

> (1) It is the Court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked at for in the words used unless there were such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the Court had to do. The Court must give effect to the plain meaning of the words however much it may dislike the result.

[20] Learned counsel therefore submitted that the HDA has no application to the JVA between the Landowners (appellant) and the Developer (respondent). A

[21] Learned counsel for the respondent however pointed out to us that what was alleged to be earlier payments to the Landowners previously for the residential payments was incorrect. He submitted that those payments were actually for the commercial properties. From the residential properties, there were three approved phases; namely: B

(i) Ibizia; C

(ii) Giorgio;

(iii) Country and Valentine.

[22] It was submitted that the Ibizia project was completed and therefore monies were withdrawn from the HDA and payments distributed to the Landowners. D

[23] But the Giorgio and Country and Valentine projects are still not completed. Therefore proceeds of sales from these two projects can only be paid out to the Landowners after completion of the said projects and not before. E

[24] Learned counsel for the respondent submitted that the Developer agree that they have to pay the Landowners Entitlement for the residential properties, but this is to take place only after completion of the development. This can be seen from the Ibizia phase, where the money was paid to the Landowners only after the completion of the Ibizia project. F

[25] Reference was made to cl. 2.3.2 of the JVA ie, regarding the commercial entitlement, whereby the Developer shall pay to the Landowners in cash upon receipt of payments progressive or otherwise from the purchasers on a monthly basis. G

[26] On the meaning of cl. 2.3.1, learned counsel submitted that the words used "... and the Developer undertakes to pay to the Landowners the Landowners Entitlement. ..." denotes that it is dependent on something to take place in the future. In this case it means that the Developer agrees to pay only upon the completion of the project. Similarly cl. 2.3.2 also carries the words H I

"progressive or otherwise" which are not found in cl. 2.3.1. Learned counsel submitted that this shows that the parties never intended that the Developer should have to make immediate payments, progressive or otherwise.

[27] On the issue raised in Question No. (ii), learned counsel for the respondent submitted that reg. 7(k) is not applicable in this case because there was no sale of the land. The Developers could not charge the land to finance the project and the Landowners still remained as the owner of the land. So the Landowners had nothing to lose. It was submitted that the Developer can only withdraw from the HDA when:

(i) each phase (eg, the Ibizia project) is completed;

(ii) there is surplus money.

[28] Reliance is placed on cls. 17 and 20 of the JVA whereby the Landowners clearly agreed to be bound by the Act. It was therefore submitted that the Landowners could not agree to be bound by the Act in some parts, but not in other parts.

The Court's Findings

[29] The determination of the three questions posed before us revolves on the construction of s. 2.3.1 of the JVA.

Question No. (i)

[30] We agree that it is the court's duty on the interpretation of clauses in an agreement, to give effect to the bargain of the parties according to their intention. Where the bargain is in writing as in this case, the JVA, the words used, in cl. 2.3.1 in particular, will have to be looked at unless they are such that one may suspect that they do not convey the intention correctly.

[31] It will be noted that in the JVA, cl. 2.3.2 in relation to the payment of commercial entitlement provides:

> In respect of development **not** falling within the Housing Developers (Control and Licensing) Act, 1966, the Landowners Entitlement shall be paid by the Developer to the Landowners in cash upon receipt of payments (progressive or otherwise) from the purchasers on a monthly basis commencing from the first sale to be paid to the Landowners on or before the 10th day of the following month supported by a statement of the sales and receipts for that month.

[32] However, cl. 2.3.1 in relation to the residential/housing development, does not contain the key words "progressive or otherwise" as found in cl. 2.3.2. One can only take this to mean that the parties had intended that the payment of entitlement in relation to the residential properties would be deferred and not immediate or progressive.

[33] It will also be noted that cl. 13 of the JVA provides:

> 13.1 Where the type of development within the Development Scheme falls within the Housing Developers (Control and Licensing) Act 1966, **the Developer shall comply with such Act and the regulations thereunder in particular the Housing Developer Account (HDA)**. The Developer shall be solely responsible for such HDA which will be operated by the Developer Provided Always that the Landowners shall not be liable in any way whatsoever in respect of such HDA.

[34] The said cl. 13 shows that the appellants were aware of the requirements of the Act. It would follow that the appellants were also accepting that the monies for the said development must flow through the HDA and that their entitlement can only be realised upon the completion of the project and not before that.

[35] Clauses 17 and 20 of the Act show the covenant by the Landowners to be bound by regs. 5 (5)(a), 10 and 11 of the Housing Development (Control and Licensing) Regulations 1989.

[36] By virtue of cl. 1.2 of the JVA, a minimum of 100 acres of the land (ie, about more than 1/3 of the overall development) shall be for commercial and/or residential development. This was to enable the Landowners to derive some immediate benefit and allow the flow of cash to them while awaiting the monies from the residential development which they knew would only come upon completion of such development.

[37] The Court of Appeal in the instant appeal was of the view that where the Landowner has entered into a JVA with the housing developer to develop the land on a joint venture basis, the Act is applicable. Based on the statutory provisions referred to above, we cannot see anything wrong and agree with the said view of the Court of Appeal. We would answer Question (i) in the affirmative.

A **Question No. (ii)**

[38] As there was no purchase of the land for the housing development in this case, reg. 7(k) of the Housing Developers (Housing Development Account) Regulations 1991 is therefore not
B applicable. There is therefore no necessity to answer Question No. (ii).

Question No. (iii)

[39] We also agree with the counsel for the respondent's
C submission that the Landowners had nothing to lose as the Developer could not charge the land to finance the projects. The monies paid by the purchasers would go into the HDA. But the developer could only withdraw from the said account when the project has been completed or when there is surplus money.
D Otherwise the Developer would have to pay out first to the Landowner out of its own pocket since it could not make any withdrawal from the HDA until the project was completed. The Developer would tend to lose out if the project is not completed eventually for some reason or other. But the Landowner would
E not lose anything as the title of the lands still remains with them.

Question No. (iii) is therefore answered in the negative.

[40] In any event, the issues for determination by this court are
F based on the construction of the relevant clauses in the JVA. It is also noted that learned counsel for the appellant had in the earlier part of his oral submission before us, agreed that the issues were only peculiar to this case. As such it would not really be of public importance. Moreover the Court of Appeal had given its
G view based on the construction of the various provisions of the JVA. (See *Datuk Syed Kechik Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors & Another Appeal* [1998] 3 CLJ 169). The grounds given by the learned Dato' Low Hop Bing, JCA are impeccable and we are in agreement with them
H entirely.

[41] For the above reasons, these appeals are dismissed with costs.

I